Supreme Court, U.S.
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No. 95-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

NEAL M. JANEY*
City Solicitor

BURTON H. LEVIN
Senior Solicitor

Law Department
City Hall, Room 107
100 North Holliday Street
Baltimore, Maryland 21202
(410) 396-3940

Counsel for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In an effort to reduce illegal consumption of cigarettes by minors, Baltimore enacted an ordinance which restricts the placement of publicly visible cigarette advertisements. The ordinance was enacted after the City Council found specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors. The ordinance is tailored to restrict only those advertisements which most directly affect minors in areas where they live, attend school, attend church, and engage in recreational activities. The district court and the court of appeals both upheld the ordinance. The questions presented are:

1. Whether in determining the constitutionality of the ordinance under the First Amendment, the reviewing court is licensed to reweigh *de novo* the evidence and predictive judgments of the legislature supporting the enactment, or to replace the legislature's factual predictions with its own.

2. Whether an ordinance restricting the *location* but not the *content* of publicly visible cigarette advertising, passed in order to reduce consumption of cigarettes by minors in violation of state law, is preempted by the Federal Cigarette Labeling and Advertising Act.

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BRIEF IN OPPOSITION

Respondents (collectively "Baltimore") urge that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered 31 August 1995 be denied for the reasons set forth below.

STATEMENT

Baltimore incorporates and adopts by reference the statement of the facts in the opinion of the Fourth Circuit. Pet. App. 2a-5a.

Rule 15 of the Rules of the Supreme Court of the United States provides that "the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Baltimore is thus constrained to address Petitioner's misstatements concerning the basis for the court of appeals' rejection of its preemption argument, and an asserted "concession" by Baltimore's counsel during oral argument in the court of appeals concerning the governmental purpose supporting the challenged ordinance.

Md. Ann. Code art. 27, § 404 (1972) prohibits the sale of cigarettes to minors.[1] Baltimore's ordinance, as stated in its preamble (Pet. App. 70a), as asserted by Baltimore

[1] The ordinance challenged in this case became effective April 6, 1994. Effective October 1, 1994, state law prohibited minors from using or possessing any tobacco product. Md. Ann. Code art. 27, §§ 404 & 405A (Supp. 1994). See Pet. App. 2a.

in court (*id.* at 16a), and as found by both the district court (*id.* at 16a; 37a) and the court of appeals (*id.* at 2a; 4a; 9a; 10a), was enacted to reduce the illegal consumption of cigarettes by minors. Thus, Petitioner misstates the case when it makes the following assertions:

> Significantly, the court of appeals did not accept the argument advanced in the City's brief that the ordinance was not based on health considerations because its drafters identified as its purpose the facilitation of compliance with a state law . . . that precludes the sale of cigarettes to minors. [Pet. 3, n. 2]
>
> * * *
>
> As we note above (at note 2), the court of appeals pointedly did not accept the City's contention that the ordinance was intended only to facilitate compliance with a state law that precludes the sale of cigarettes to minors. [Pet. 23, n. 15]
>
> * * *
>
> [T]he City has conceded that the ordinance is predicated on the relationship between smoking and health. [Pet. 23]

The district court was very specific in disposing of Petitioner's preemption argument, and the court of appeals adopted and followed the reasoning of the district court. In determining that the ordinance is not one "based on smoking and health" as that phrase is used in 15 U.S.C. § 1334(b), the preemption section of the Federal Cigarette Labeling and Advertising Act, the district court stated:

> Ordinance 307 is clearly aimed at the illegal sale of cigarettes to minors. Its purpose is to effectuate [Md. Ann. Code art. 27] § 404 and, therefore, Ordinance 307 is not " 'based on smoking and health . . . ' giving that clause a fair but narrow reading." [*Cipollone v. Liggett Group, Inc.*] 112 S. Ct. at 2621.
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> * * *
>
> Similarly, Ordinance 307 is not "based on smoking and health" but rather on a more general obligation – the duty not to advertise products which are illegal for sale to minors on a medium which has undue influence on minors, or, in other words, the duty not to unduly encourage illegal transactions.

Pet. App. 37a; 38a. It is thus clear that the district court, whose reasoning was explicitly adopted by the court of appeals (as will be shown instantly) *did* accept Baltimore's contention that the ordinance is intended to facilitate compliance with the state law which precludes the sale of cigarettes to minors.

The court of appeals observed that the purpose of Baltimore's ordinance is "to reduce the illegal consumption of cigarettes by minors." Pet. App. 2a; 3a. The court of appeals opined that "the ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health* (Pet. App. 9a) (emphasis in original), and that "[a] regulation with such a general relationship to cigarette smoking – in contrast to a specific advertising 'prohibition based on smoking and health' – is not preempted by the Federal Cigarette Labeling and Advertising Act." *Id.* Lest there be any doubt as to the basis for the court of appeals' rejection of Petitioner's

preemption argument, and to put the lie to Petitioner's erroneous statement that "the court of appeals *pointedly* did not accept the City's contention that the ordinance was intended only to facilitate compliance with a state law that precludes the sale of cigarettes to minors," Pet. 23, n. 15 (emphasis added), it is only necessary to refer to the following statement from the decision of the court of appeals:

> For the reasons stated above, as well as those articulated by the district court in its well-reasoned opinion, *see Penn Advertising*, 862 F.Supp. at 1415-20 [Pet. App. 33a-43a], we reject the contention that Ordinance 307 is preempted and therefore null and void.

Pet. App. 10a.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE FOURTH CIRCUIT NEITHER INVOLVES A QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THIS COURT NOR CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The first question presented in the petition (which Petitioner has loaded with a mischaracterization of the court of appeals' decision) does not raise a question of federal law that has not been settled by this Court. The nature of the judicial inquiry into the constitutionality of restrictions on commercial speech has repeatedly and recently been addressed by this Court, to the extent that the question should be deemed settled. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995); *Rubin v. Coors Brewing*

Co., 115 S. Ct. 1585 (1995); *Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084 (1994); *United States v. Edge Broadcasting System, Inc.*, 113 S. Ct. 2696 (1993); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). *See also Turner Broadcasting System Inc. v. FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion).[2] As a court of law, and not a court of error, this Court must be wary of petitions (such as the instant one) which invite it to review a court of appeals' determination as to the sufficiency of a legislative record based on an asserted inconsistency between the decision of the court of appeals and the holdings of this Court; and the Court's skepticism about granting review under such circumstances should be magnified where, as here, the petition does not assert that the issue presented is one which has split the courts of appeals or has not yet been settled by this Court.

In light of the many recent pronouncements of this Court concerning the scope of judicial review of restrictions on commercial speech two points bearing on this case's candidacy for certiorari must be acknowledged: (1) even if the decision of the court of appeals is erroneous (a contention which Baltimore vehemently rejects and which will be touched upon below) it is not likely that the lower federal and state courts will follow its statement of the scope of judicial review rather than the many recent

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[2] The First Amendment issue in this case is tangentially related to the issue presented in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, cert. granted, 116 S. Ct. 35 (1995), although the decision in that case is not likely to shed new light on the law which, if it had been available at the time of the court of appeals' decision, might have led the court of appeals to a different result.

statements of this Court, and (2) review of this case is decidedly not likely to result in the announcement of any new commercial speech jurisprudence by this Court (much less to settle an issue which has not previously been settled).

* * *

There is neither apparent nor actual conflict between the decision of the Fourth Circuit and decisions of this Court. In terms of its statement of the criteria a court must employ in determining the constitutionality of a commercial speech restriction, the Fourth Circuit correctly set out this Court's controlling test as first announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980). Pet. App. 10a. The Fourth Circuit elaborated on that statement by reference to its contemporaneous decision in the related case of *Anheuser-Busch Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), cert. pending, No. 95-685 (reprinted at Pet. App. 46a-67a). Pet. App. 11a; 12a. *Anheuser* contains a detailed analysis and explication of the appropriate standard of review as revealed by the decisions of this Court. *See* Pet. App. 54a-55a, 58a-65a (63 F.3d at 1311-1317).

In this case, as in *Anheuser*, Baltimore met its burden under the *Central Hudson* third prong with *both* empirical support and sound reasoning. This Court has recently affirmed that restrictions of commercial speech may be justified based on "simple common sense," *Went For It*, 115 S. Ct. at 2378, and the common sense link between cigarette advertising on billboards and consumption of cigarettes by minor is self apparent. *Cf., Edge Broadcasting*

Co.; Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); *Anheuser; Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490 (10th Cir. 1983), rev'd on other grounds sub. nom. *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984). *See also Cal-Almond Inc. v. United States Department of Agriculture*, 14 F.3d 429, 439 (9th Cir. 1993) ("[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised"). The cases relied upon by Petitioner to demonstrate a conflict between the decision of the Fourth Circuit and decisions of this Court, such as *Edenfield, Ibanez* and *Coors*, are all distinguishable from the instant case because in none of them was there a logical or common sense link between the restraint imposed by the legislature and the governmental interest sought to be advanced. Without evidence compensating for the lack of a logical or common sense link, the efficacy of the restraints in the cases relied upon by Petitioner could be defended with only speculation.

This case does not provide a vehicle for reexamination of this Court's assumption, as a matter of law, that advertising increases consumption. Baltimore relied on more than judicial notice and common sense to satisfy its burden: it relied on evidence. The Fourth Circuit sustained Baltimore's law based on a legislative record containing much more than tidbits of evidence or speculation. Using language which demonstrates that the court of appeals correctly understood Baltimore's burden and held Baltimore to it, the court stated:

> The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position.

Pet. App. 3a. The studies and articles referred to in the preamble to Baltimore's ordinance, which the City Council and both of the lower courts found sufficient to demonstrate *convincingly* that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes, were placed in the record by Baltimore, and are sufficient to satisfy its burden under the third prong of *Central Hudson*. Review of the determination of the lower courts as to the sufficiency of the evidence in the legislative record would not be a prudent use of this Court's certiorari jurisdiction, and would not be consistent with its role under the Constitution.

* * *

Petitioner's argument based on the fourth prong of *Central Hudson* is no more than a mere assertion that the Fourth Circuit erred, without pretense that discretionary review by this Court would be of interest or importance to anyone other than the parties. In any event, there was no error. Baltimore's enactment is well tailored to achieve no more than its substantial objective. The capacity of Baltimore to sponsor an educational campaign to teach children the danger of tobacco does not render the City's restriction of Petitioner's billboards too burdensome. This

Court considered and rejected an identical "counter-speech" argument in *Posadas*, and in so doing cited with approval the Fifth Circuit's rejection of the same argument in *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984). See *Posadas*, 478 U.S. at 344.[3]

Petitioner's reliance on *Discovery Network* is misplaced. The ban on commercial newsracks in that case was struck down because such newsracks were no greater an eyesore than the noncommercial newsracks which were left unregulated, thus establishing that Cincinnati drew a distinction which bore no relationship whatsoever to the particular interest that the city had asserted. 113 S. Ct. at 1508-1509. It is otherwise as to the distinction between the medium of advertising which the Baltimore ordinance restricts and media which it leaves free from restriction. Long ago this Court recognized that billboards are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation. In upholding against an equal protection challenge a 1921 Utah statute (currently codified at Utah Code Ann. § 76-10-102) which provided, much like the Baltimore ordinance in this case, that "It shall be a misdemeanor for any person . . . to

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[3] Despite Petitioner's assertion that *Posadas* has been overruled *sub silentio* by *Edenfield*, *see* Pet. 14, *Posadas* is still good law and was quoted with approval in *Coors*, 115 S. Ct. at 1591. Nor has this Court adopted a "least restrictive means" approach to commercial speech restrictions, *Went For It*, 115 S. Ct. at 2380, although that approach best explains Petitioner's argument.

display on any billboard . . . any advertisement of cigarettes, . . . provided that nothing herein shall be construed to prohibit the advertising of cigarettes . . . in any newspaper . . . ," this Court stated:

> Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard. . . . These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (quoting 297 P. 1013, 1019). It is the tendency of billboards to be immune from all attempts at parental supervision which motivated Baltimore to restrict billboards in particular. *Discovery Network* is thus inapposite.

* * *

In the Federal Register of August 11, 1995 (60 FR 41314), the Food and Drug Administration of the United States Department of Health and Human Services issued a proposed rule that would govern the sale and distribution of nicotine-containing cigarettes in order to protect

children and adolescents. The proposed rule would reduce the amount of imagery that makes cigarettes attractive to children and adolescents; would limit advertising to which children and adolescents are exposed to text-only format; and would ban outright advertising of tobacco products located within 1,000 feet of schools and playgrounds. *See* 60 FR 41314-41315. The proposed rule would require manufacturers, distributors, and retailers of cigarettes to comply with any more stringent state or local requirements relating to the sale, distribution, labeling, or advertising of cigarettes provided that the state or local requirement does not conflict with FDA regulations.[4] The proposed FDA regulations are supported by a veritable mountain of scientific information, including studies on the effect of cigarette advertising on children and adolescents. *See, e.g.,* 60 FR 41314-41321.

The Baltimore ordinance challenged in the instant case pales in significance compared to the sweeping federal regulation of cigarette advertising which is now under advisement by the FDA. The time for this Court to wade into the controversy is not now; if it ever arrives the proper time will be when the Court is faced with a case involving a challenge to advertising restrictions of

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[4] If adopted the proposed rule prohibiting cigarette ads on billboards within 1,000 feet of any playground, elementary school or secondary school will be codified as 21 C.F.R. § 897.30(b). If adopted the reverse preemption provision allowing local governments to adopt more stringent advertising restrictions will be codified as 21 C.F.R. § 897.42(a). *See* 60 FR 41374, 41375. FDA has extended the comment period on the proposed regulations to January 2, 1996. *See* Federal Register of October 16, 1995 (60 FR 53560).

national scope, such as those currently proposed by the FDA.

II. THE FOURTH CIRCUIT CORRECTLY DECIDED AN ISSUE OF FIRST IMPRESSION ARISING UNDER THE PREEMPTION SECTION OF THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

The second question presented in the petition concerns whether the Fourth Circuit erred in rejecting Petitioner's preemption argument under 15 U.S.C. § 1334(b). None of the reasons for Supreme Court review advanced by Petitioner withstand scrutiny: the decision of the Fourth Circuit does not subject cigarette manufacturers to any restriction concerning the content of their advertising, and thus can hardly be argued to have a negative impact on the national economy and thereby upset the balance struck by Congress; no pending or proposed legislation regarding cigarette ads (*see* Pet. 6, n.5) has yet generated even one other case which would be affected by a decision of the Supreme Court; the law which the Second Circuit held was preempted in *Vango Media Inc. v. City of New York*, 34 F.2d 68 (2nd Cir. 1994), was a regulation of the *content* of cigarette advertising, requiring a minimum of one public health message to be displayed for every four tobacco advertisements displayed on property and faculties licensed by the City, and thus cannot fairly be considered to involve the same issue as the instant case or to be squarely in conflict with the decision in this case.

It cannot be seriously maintained that the decision of the Fourth Circuit constitutes a hindrance to Congress'

purpose in enacting 15 U.S.C. § 1334(b). The language and legislative history of the Act make it abundantly clear that Congress was concerned only with protecting the tobacco industry from the chaos of local laws that would alter the content or regulate the message of cigarette commercials. Local or state content regulation would make it difficult to market cigarettes on a national scale with national themes and messages. The Baltimore ordinance does not regulate content and thus poses no threat to Congress' purpose in enacting the preemption section.[5]

Furthermore, as this Court held in *Cipollone*, there is a strong presumption against preemption, and § 1334(b) must be narrowly construed. 112 S. Ct. at 2621. In *Cipollone* the Court held that tort claims against cigarette manufacturers based on fraud and misrepresentation are not preempted because they are not "based on smoking and health" as that phrase of § 1334(b) is properly construed, but rather on a more general obligation – the duty

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[5] *In Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2616 (1992) this Court referred to a 1965 statement by renowned tobacco foe Senator Frank Moss of Utah, the floor leader who guided the 1969 Act through the Senate. Senator Moss stated that his own state was considering a cigarette warning label requirement, but that he "[did] not favor individual state action in this matter because of the maze of confusing regulations which would result." 111 Cong. Rec. 13901 (1965). Senator Moss never expressed any reservation about Utah's complete ban on any public display of cigarette ads on such media as billboards, transit signs, and point-of-sale displays that had been on the books for forty years and had always been enforced. Nor did anyone else. *See Packer Corp. v. Utah*, 285 U.S. 105 (1932) *and* Utah Code Ann. § 76-10-102.

not to deceive. 112 S. Ct. at 2624. Both of the lower courts in this case were correct in holding that Baltimore's law is not "based on smoking and health" but rather on a more general obligation – "the duty not to advertise products which are illegal for sale to minors on a medium which has undue influence on minors, or, in other words, the duty not to unduly encourage illegal transactions." Pet. App. 38a (opinion of the district court). *Compare Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994), cert. denied, 115 S. Ct. 577 (1994) (consumer's suit against cigarette manufacturer and its advertising agencies for injunctive relief, asserting claims of unfair business practices and unjust enrichment in connection with manufacturer's advertising campaign allegedly targeted at minors, held not preempted by 15 U.S.C. § 1334(b)).[6]

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[6] As observed in both *Cipollone* and *Mangini*, the Senate Report regarding the 1969 Act emphasized that 15 U.S.C. Section 1334(b) is narrowly phrased to preempt only state action based on smoking and health but "[i]t would in no way affect the power of any State . . . with respect to the taxation of *the sale of cigarettes to minors*, or the prohibition of smoking in public buildings, or *similar police regulations*. S. Rep. No. 91-566, p. 12 (emphasis added). *See Cipollone*, 112 S. Ct. at 2624 and *Mangini*, 875 P.2d at 81.

In *Mangini* the Court also observed that Congress has enacted legislation allowing certain monetary grants to states, but "only if the State involved has in effect a law providing that it is illegal for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18, and "will enforce" that law. 42 U.S.C. § 300x – 26(a), (b). A state receiving such a grant must agree to develop "strategies to discourage the use of . . . tobacco products by individuals to whom it is unlawful to sell or distribute such products." 42 U.S.C. § 300x – 22(b)(2)(B). Quoted in *Mangini*, 875 P.2d at 82.

Petitioner argues that *Vango* is in conflict with the decision of the Fourth Circuit. To the contrary, the case is distinguishable. The point of distinction is captured in Judge Murray's opinion for the district court.

> But *Vango* substantially differs from the present case. The New York law required, as a condition of cigarette advertising, a different message regarding the health risks of smoking than the federally-mandated warning, thus bringing the statute into conflict with the second stated purpose of the FCLAA. . . . Ordinance 307 does not require any message at all, let alone a message that conflicts with the one mandated by Congress.

Pet. App. 42a. *See also* Pet. App. 8a-9a (court of appeals cites *Vango* with approval).

If it is the case that this Court has a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question, since the doctrine of judicial restraint has taught that patience in the judicial resolution of conflicts may sometimes produce the most desired result, then the supposed "conflict" between the decision of the Fourth Circuit in this case and the single decision of the Second Circuit in *Vango* does not provide an adequate basis for Supreme Court review.

CONCLUSION

For the foregoing reasons Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

NEAL M. JANEY*
City Solicitor

BURTON H. LEVIN
Senior Solicitor

Department of Law
100 North Holliday Street
Baltimore, Maryland 21202
(410) 396-3940

December, 1995

*Counsel of Record